No. 92-355

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MIDCO PIPE & TUBE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a distributor of product in a vertical distribution arrangement is subject to criminal liability for a *per se* bid rigging violation of the Sherman Antitrust Act where: (1) the sole parties to the contract were the distributor and its customer; and (2) the distributor was acquiescing to the command of its customer to set prices.

2. Whether a distributor can cause an antitrust injury to its customer's third party end-user when the customer's contracts with the third party end-user predate the distributor's allegedly anticompetitive behavior and the nature of those contracts are unknown to the distributor.

LIST OF PARTIES

In the proceeding in the Fifth Circuit, the United States of America was the plaintiff-appellee and Midco Pipe & Tube, Inc. ("Midco"), Mannesman International Alloys, Inc. ("MIA") and Richard A. Brazzale ("Brazzale"), Vice President and Director of MIA were the defendants-appellants.

In the district court, the corporate defendants indicted in addition to Midco and MIA were: All Star Industries, Inc. ("All Star"), Capitol Pipe & Steel Products, Inc. ("Capitol"), Texas Pipe Bending Company ("TPB") and U.S. Metals, Inc. ("U.S. Metals"). The individual defendants indicted in addition to Brazzale were Carlton H. Bartula ("Bartula"), TPB's head purchasing agent, and Ronald S. Palma ("Palma"), Vice President and Sales Director of All Star and formerly Executive Vice President of Capitol.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Midco Pipe & Tube, Inc. ("Midco"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 28, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the conviction of the defendants, including Midco, is reported at 962 F.2d 465 (5th Cir. 1992), and appears as Appendix A to this petition. The findings of the jury and subsequent judgment of the district court are unreported.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 28, 1992. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Sherman Antitrust Act (1984):

15 U.S.C. § 1

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

I. Material Facts

Midco, an Illinois based distributor of metal piping and tubing, together with other pipe distributors, was charged in a one-count indictment with conspiring to suppress and eliminate competition on bids to supply pipe to its customer, a pipe fabricator, TPB. TPB, in turn, was charged with aiding and abetting the conspiracy. The conspiracy was alleged to have occurred during the bidding process to supply pipe to TPB for end users such as utility or energy companies, or the engineering companies repre-

senting them, under the cost-plus portions of certain contracts, in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).[1] The indictment further charged that TPB created and directed the bidding process among its pipe distributors and that TPB's head purchasing agent, Bartula, "commanded" the operation. Specifically, paragraph 12 provides:

> Defendants TPB and Carlton H. Bartula willfully aided, abetted, counseled, commanded, induced and procured the aforesaid combination and conspiracy in violation of 15 U.S.C. § 1 (18 U.S.C. § 2).

The following facts are drawn from the testimony of the Government's own witnesses.

A. *Overview of the Piping Supply Industry*

In the piping supply industry there are typically three levels of production and distribution: manufacturers, distributors and fabricators. Manufacturers are steel mills who produce the raw product. That raw product includes two general types of piping, carbon piping and specialty alloy piping. Carbon piping comes from numerous sources, so suppliers face stiff competition in the marketplace. Spe-

[1] Paragraph 11 of the indictment provided:

> Beginning sometime before 1981, and continuing until at least sometime in 1984, the exact dates being unknown to the Grand Jury, defendant pipe distributors, associated individual defendants, and their co-conspirators engaged in a combination and conspiracy to suppress and eliminate competition on bids to supply pipe to defendant TPB for end users, or the engineering companies representing them, under the cost-plus portions of certain contracts, in unreasonable restraint of the above described interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

cialty piping is less commonly produced and its market is subject to more volatile price fluctuation.

Pipe distributors, in turn, typically purchase large quantities of pipe from the production mills, store the pipe in their warehouses and then sell it in smaller quantities as it is needed by their customers, generally pipe fabricators or end users. Distributors are important in the chain of supply because they can sell smaller quantities to customers and deliver these quantities promptly from their inventory. In essence, distributors serve as a ready supply source for piping supplies in the industry. Several specialty pipe distributors operated in the Houston area in the early 1980s including Guyon Alloys, Inc., Gulfalloy, Capitol, U.S. Metals, All Star and Midco. At times, these distributors bought and sold pipe among themselves to service clients or adjust internal inventories.

Between 1981 and some unspecified period in 1984, the time period covered by the indictment, distributors also sold a great volume of specialty pipe directly to the oil refining and power generation industries. These direct purchases by engineering companies or contractors were at prices stated in the respective contracts or purchase orders.

Pipe fabricators perform the function of assembling, bending and welding fittings and flanges onto pipes. Fabricators are able to assemble pipe in a more cost-efficient basis than contractors who typically must pay higher labor for assembly at an on-site location. Most of the major pipe fabricators were owned by conglomerate corporations. TPB, a subsidiary of Bendix Corporation, was one such pipe fabricator.

The pipe industry is structured as follows:

PIPE INDUSTRY

END-USER

CONTRACTOR

ARCHITECT AND ENGINEER

FABRICATORS

PIPE DISTRIBUTORS

On major construction projects in the pipe industry, business flowed on a vertical basis. Typically, an end-user such as an oil company entered into a contract with a general contractor. The contractor was also generally the architect or engineer. If pipe fabrication was necessary, the contractor entered into a contract with a fabricator. Finally, the fabricator entered into a contract with a pipe distributor.

At each level, there were numerous competitors from which to choose. By the time a fabricator contracted with a pipe distributor, the contract between the fabricator and the architect, engineer or contractor was already in place. The distributor, such as Midco, was not a party to that contract, had not seen that contract and did not know the basis of any quotation made by a fabricator to a contractor. Once a distributor sold pipe to a fabricator, the fabricator took title to the pipe.

Major contractors and engineering firms were generally familiar with prices of pipe in the industry. In addition, in accordance with the terms of their contracts with fabricators, contractors and end users usually had the right to review and approve or reject the prices submitted by the pipe distributors to the fabricator.

The contractors received bid summaries from the fabricators which contained quotations from suppliers for the various commodities. The fabricator then asked the contractor for approval of recommended bids. From this information, the contractor could determine who the low cost bidder was or which bid was best. The bidder with the lowest price did not necessarily always win the bid. The contractor who had final approval rights on bids might recommend that the pipe contracts be split or allocated among various bidders.

B. *Cost-Plus Contracts*

Some contracts in the specialty pipe industry were handled on a "cost-plus" basis, which means that the distributor sold the pipe to a fabricator for a certain "cost," and the distributor in turn added a percentage (i.e., the "plus") to the price it charged the contractor or end-user for handling and fabrication or labor. Other contracts were arranged on a "lump sum" or "hard money" basis, which means that a flat fee was charged and there was no provision for an additional percentage mark-up. For large construction projects, almost all the fabricators purchased pipe from distributors on a cost-plus basis. Distributors, though, were typically *not* aware of the arrangements made between fabricators and contractors.

There were several reasons why a cost-plus contract was necessary in the construction industry. First, a particular job might require many tons of alloy or stainless steel pipe, but the end user or contractor could not specify the details about the quantities in terms of size and grade at the time of contracting. A cost-plus contract provided the contractor a way to circumvent the lack of specificity during contracting. Second, cost-plus contracts allowed a

fabricator to reserve its shop space without worrying about fluctuations in the price of the pipe. Third, a cost-plus contract allowed a contractor to limit its exposure during the periods when prices for specialty pipe might be volatile. Ultimately, the cost-plus contract was meant to provide overall economy to a job.

There were many factors that might affect the price of pipe charged by a distributor. Among these factors were: (1) urgency of the purchase; (2) whether a particular distributor was the only distributor with the required product at a particular time; (3) whether the purchase had to be made from distributors appearing on a certain approved vendor list; (4) the length of time a distributor was required to keep the product in inventory before payment; (5) the volume of the market at that time; (6) whether the sale in question was from the distributor's inventory or whether it was a buyout from another distributor; (7) transportation and delivery costs; (8) terms of the sale; (9) reliability of supplier; (10) fluctuation of foreign currency; (11) fluctuation of nickel prices; and (12) quotas on importation.

C. *Texas Pipe Bending's Arrangement of Bids*

During 1981-1984, on certain cost-plus jobs where TPB was the fabricator supplying pipe to contractors or end-users, Bartula of TPB engaged Palma as the so-called "quarterback" to coordinate the process of obtaining bids from pipe distributors.

Initially, Bartula would make the decision that a job was to be "quarterbacked". TPB then generated a bid list, showing the nature and amount of piping required and sent it out to various vendors approved by TPB and the contractors or end users. As "quarterback", Palma acted

as the go-between for TPB and the distributors. He would receive bid numbers and quotations from Bartula to pass on to distributors to put in their bids on cost-plus contracts. In essence, if Palma played the role of "quarterback," Bartula called the plays as coach.

D. *Midco's Role*

Before the early 1980s, Midco, a pipe distributor, had done very little business with Houston-based defendant, TPB. In an effort to increase its business with TPB, in 1982, Midco entered into a volume discount agreement with Bendix Corporation, TPB's parent company, which set forth a volume discount schedule on sales of materials from Midco to TPB.

In addition, in 1982, Palma, who was then employed by defendant Capitol, approached Midco with the idea of becoming Midco's sales representative. Based on Palma's good reputation in the industry, Midco believed it would make sense to retain him as a sales representative.

After entering into a written agreement, Palma represented Midco for the purpose of making sales to TPB and other major pipe fabricators. The agreement specifically provided that Palma was an independent contractor, and not an employee or agent of Midco. Palma held no ownership interest in Midco. He received no salary from Midco, only the commissions from the sales he generated. Pursuant to the contract, he paid all expenses. Midco never attempted to conceal this relationship. It was a conventional sales representative agreement.

During 1983 and 1984, Palma talked with representatives at Midco and notified them when job inquiries were available. Typically, Palma called Saverio C. Rossetti, Sr. ("Rossetti"), Midco's Vice President and General Sales

Manager, or Robert Cohn ("Cohn"), Midco's Executive Vice President. Midco, in turn, prepared quotes, which it thought the market would bear on particular items. At times, Palma advised Midco to quote higher price figures. Midco followed Palma's instructions because Palma was its sales representative and Midco assumed he knew what he was doing. Midco believed that Palma was performing a function that was included within the sales representative agreement. In fact, although other distributors knew Palma was "quarterbacking," neither Rossetti nor Cohn, nor anyone from Midco, had ever heard of the term during the early 1980s.

Palma never told Midco whose prices it was overbidding. Moreover, throughout the period from 1983 through 1984, Midco never spoke to its competitors about particular jobs, and no person, other than Palma, ever asked Midco to increase a price on a bid to TPB.

At no time did Midco meet with its competitors to allocate jobs. All Midco contacts on allegedly "quarterbacked" contracts for TPB were with Palma, who was acting for TPB's Bartula. In fact, the Government's own lawyers conceded during their closing argument that "the people at Midco, Rossetti and Cohn, didn't talk to any other conspirators."

II. Proceedings Below

The case was tried to a jury, the Honorable David Hittner, United States District Judge for the Southern District of Texas, Houston Division, presiding. 18 U.S.C. § 3231. Over defendants' objections the jury was given instructions about the *per se* rule regarding Section 1 of the Sherman Act. The jury convicted Midco and others. Defense motions for judgment of acquittal and for a new trial at the close of the evidence were denied.

The trial court then imposed a fine in the amount of $250,000 upon each of the three convicted corporate defendants, Midco, MIA and All Star. The court also ordered that each of the three corporate defendants be held jointly and severally liable for restitution in the amount of $895,935. The court then suspended imposition of the sentence as to the three corporate defendants and placed them on probation without supervision for a period of five years. *See* Appendix B to this petition.

On appeal, pursuant to 28 U.S.C. § 1291, the Fifth Circuit affirmed the trial court's application of the *per se* rule and the resulting convictions.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The decision below for the first time criminalizes previously acceptable conduct between contracting parties. This case, therefore, presents the novel question, one of first impression in this Court, of whether a distributor of pipe in a vertical distribution market can be subject to criminal liability premised on a *per se* violation of the Sherman Antitrust Act where the distributor increased its prices on bids merely to capitulate to the demands of its customer. Similarly unique is the question as to whether an antitrust injury can be inflicted upon a third party whose contractual arrangements predate the allegedly anticompetitive conduct.

For four years, Midco and other distributors asked the Government to cite one case where such conduct had been found to be a civil antitrust violation much less where criminal liability had been imposed. The Government could not. Nor did the Fifth Circuit.

Nevertheless, the Fifth Circuit answered both questions affirmatively by upholding the conviction of the petitioner and other pipe distributors. In so doing, the Fifth Circuit decided an important question of federal law which has not been, but should be, considered and resolved by this Court. The decision is in conflict with precedents of the Third Circuit, which have rejected characterizing as antitrust violations the fixing of prices between the contracting parties. It is in direct conflict with the decisions of the Ninth Circuit which have recognized that when an alleged conspirator and its "victim" are parties to a contract that predate allegedly anticompetitive behavior, there is no harm to competition. It strays from the path of economic realism along which this Court has travelled most recently, and which has resulted in a preference for thoughtful reasonableness over the formalistic application of *per se* liability, especially in cases involving vertical combinations.

The indictment did not charge and the evidence did not show a previously recognized antitrust violation, criminal or civil. The indictment did not charge and the evidence did not show that Midco and other pipe distributors, on their own, got together to rig bids to the detriment of their mutual customer, TPB, or anyone else. Instead, the indictment charged, and if the Government's own witnesses are to be believed, the evidence showed that TPB, through its head purchasing agent, Bartula, *created* and *directed* the bidding process. Paragraph 12 of the indictment provided:

> Defendants TPB and Carlton H. Bartula willfully aided, abetted, counseled, commanded, induced and procured the aforesaid combination and conspiracy in violation of 15 U.S.C. § 1 (18 U.S.C. § 2).

Moreover, the evidence was consistent and clear that the bids made by defendant distributors were subject to

rejection or approval by TPB's customers (often unknown and always contractually unrelated to the distributors), who were quite aware of commodity prices. The Sherman Act is not designed to prevent unfair pricing under every contract, nor is it designed to prevent breach of contract or fraud between contracting parties. Instead, the Sherman Act is concerned solely with preventing anticompetitive activity. There was none here. The Fifth Circuit's extension of *per se* liability below was novel, unwarranted and dangerous. This Court should intervene.

I.

IN CONFLICT WITH THE THIRD CIRCUIT, THE FIFTH CIRCUIT'S DECISION BELOW EXTENDS *PER SE* LIABILITY UNDER THE SHERMAN ANTITRUST ACT TO AGREEMENTS BETWEEN CONTRACTING PARTIES.

Until the Fifth Circuit's decision in the instant case, the *per se* prohibition of Section 1 of the Sherman Act had not been extended to price restrictions entered into voluntarily by "the contracting parties themselves." *Sitkin Smelting & Ref. Co. v. FMC Corp.*, 575 F.2d 440, 446 (3d Cir. 1978), *cert. denied*, 439 U.S. 866 (1978). Rather, price fixing was an antitrust violation under Section 1 only if it involved an agreement to fix the prices to be charged in transactions with third parties. *Id.* at 446.

The indictment in the present case did not allege that the defendant distributors told TPB what to charge third party end users. To the contrary, TPB instructed the distributors. The Fifth Circuit's failure to understand *Sitkin* requires intervention by this Court.

In *Sitkin*, the defendant solicited a bid for the sale of scrap from the plaintiff. The defendant disclosed this bid to another preselected party which outbid the plaintiff.

The plaintiff charged the defendant with illegal boycotting and price fixing based on this sham bidding arrangement. The Third Circuit held that this behavior did not constitute a *per se* violation of antitrust laws because "[t]he mere existence of sham bidding . . . does not create a presumptive violation of the Sherman Act." *Id.* at 447. Further, because the price was fixed by the parties to the contract, it simply was not an antitrust violation. *Id.* at 446; *see also United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1196 (3d Cir. 1984) (district court properly instructed jury that if customer acquiesced in the bidding procedures, defendants should be found not guilty), *cert. denied*, 470 U.S. 1029 (1985); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 256 (3rd Cir. 1984), *cert. denied* 471 U.S. 1016 (1985); *cf. General Cinema Corp. v. Buena Vista Distrib. Co.*, 532 F.Supp. 1244 (C.D. Cal. 1982) (imposition of bidding restrictions by customer removes activity from *per se* liability).

The Third Circuit's rationale in *Sitkin* and *Fischbach* is particularly relevant to the instant case. Midco contracted directly with TPB. Clearly, under the *Sitkin* and *Fischbach* standard, TPB and Midco, as biddee and bidder, could not violate the Sherman Act at all, much less *per se*. Certainly, the Sherman Act does not impose an absolute obligation on bidders to engage in bidding in a manner other than what their customers seek.

Because TPB, as a contracting party, requested or, as the indictment (¶ 12) put it, "counseled" and "commanded" that Midco submit bids at certain prices, the trial court should not have applied any standard of antitrust illegality to Midco's actions. Not only did the trial court invoke a standard, without precedent it invoked the *per se* rule which allowed criminal conviction.

The Fifth Circuit compounded the error by sanctioning this new application of *per se* liability in the absence of any supporting authority and in direct contravention of the Third Circuit's previously unchallenged approach. The Fifth Circuit attempted to distinguish *Sitkin* in a footnote by commenting that *Sitkin* did not involve any horizontal collusion among competing buyers or sellers. 962 F.2d at 470, n. 10; App. A, at 9. Ironically, the Fifth Circuit then cited the very language from *Sitkin* which bears on this case: "The price-fixing within the scope of the per se prohibition of § 1 . . . is an agreement to fix *the price to be charged in transactions with third parties, not between the contracting parties themselves.*" 962 F.2d at 470, n. 10; App. A, at 9, citing *Sitkin*, 575 F.2d at 446 (emphasis added). This is precisely the point that Midco and the other distributors attempted to make. There can be no antitrust violation here, and certainly not a *per se* violation, where the distributors did not agree to fix the prices to be charged to third party end-users, but only acceded to the demand of *their* customer, TPB.

The net result of the Fifth Circuit's decision is a dangerous precedent which criminalizes conduct between contracting parties. Without any guiding precedent and in direct conflict with the Third Circuit, Midco now finds that it is subject to over one million dollars in fines and penalties because it acquiesced to a customer's order!

II.

IN CONFLICT WITH THE NINTH CIRCUIT, THE FIFTH CIRCUIT'S DECISION BELOW EXTENDS *PER SE* LIABILITY UNDER THE SHERMAN ACT TO CONDUCT OCCURRING AFTER THE ALLEGED VICTIM ENTERED INTO ITS CONTRACT.

The Fifth Circuit's decision in this case also failed to acknowledge the countervailing authority from a sister circuit concerning the effect of *pre-existing* contracts on the application of *per se* liability. Courts apply a *per se* standard of illegality only to practices that definitely have anticompetitive effects. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979). Where, however, as here, no court had yet determined that the conduct alleged always causes an antitrust injury, questions regarding whether such an injury results from a defendant's conduct are pertinent.

Moreover, the Ninth Circuit has already looked at such conduct and found no antitrust liability. The Ninth Circuit has held that when alleged conspirators and their "victims" are parties to contracts that predate anticompetitive behavior there is no harm to competition because "[t]he subsequent conspiracy could not have affected the competition . . . at the time the contracts were made." *Newman v. Universal Pictures*, 813 F.2d 1519, 1522 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988).

In *Newman*, the plaintiffs, an actor, director and production corporation, entered into a percentage contract with the defendant film studio. Subsequently, the defendant and several other studios released movies on video cassettes. The plaintiffs claimed that the movie studios had conspired to apply their percentage agreements in a manner that decreased the artists' draw. The Ninth Circuit held that the plaintiffs could not prove that they were

injured by the defendant's post-contract conduct: "Allegations of price-fixing alone, unconnected to any of plaintiffs' activities for which damages are sought, do not set forth a claim under the antitrust laws." *Id.* at 1523.

Furthermore, if a remedy is appropriate for such conduct, it is an action for breach of contract, not a suit based upon antitrust law. *Orion Pictures Distribution Corp. v. Syufy Enterprises*, 829 F.2d 946, 949 (9th Cir. 1987). In *Orion*, the Ninth Circuit ruled that the defendant, a movie exhibitor was not liable under the Sherman Act for cancelling a pre-existing contract with the plaintiff film distributor after monopolizing the Las Vegas movie market. The court reasoned that because competition was no longer a factor in determining the defendant's obligation to the plaintiff, the plaintiff's injury did not reflect the anticompetitive effect of monopolization. Rather, the plaintiff suffered a breach of contract, not an antitrust injury. *Id.* at 949.

In the instant case, the end-users, like the plaintiffs in *Newman* and *Orion*, were parties to established contracts that pre-dated the alleged conspiracy. TPB, a pipe fabricator, submitted bids to end-users. TPB competed with other fabricators whose bids were rejected by the end users in favor of TPB. The bidding at this level was so intense that it resulted in low mark-ups for specialty alloy pipe of only 3-5%. By the time Midco entered the bidding process, the end-users had already benefited from competition—the competition between TPB and other fabricators. Therefore, they suffered no cognizable antitrust injury. Because there was no antitrust injury, the trial court erred in instructing the jury pursuant to the *per se* rule.

In addition, the end-users, like the plaintiffs in *Newman* and *Orion* were cloaked in contractual rights. Their con-

tracts allowed them to review and approve or reject unfavorable bids from distributors. Because the end-users often dealt directly with pipe distributors, they were familiar with industry customs, standards and prices. Consequently, the end-users were perfectly capable of refusing Midco's bids or enforcing their contractual rights against TPB. Indeed, they did so from time to time.

The Fifth Circuit's opinion in this case is wholly devoid of any analysis of the Ninth Circuit's decision *Newman* and *Orion*. At no point did the Fifth Circuit acknowledge that the end-users had pre-existing contracts with TPB under which they had substantial rights concerning the price and bids that were received. This Court now has an opportunity to clarify whether such an analysis should be required before a decision to apply *per se* criminal liability under the Sherman Act.

III.

THE FIFTH CIRCUIT'S DECISION DULLS THE POINT OF *SHARP*.

Rather than expanding the *per se* rule to vertical relationships, the contemporary trend has been to limit the application of the *per se* rule. In recent years, this Court has even narrowed the once sacrosanct application of the *per se* rule in horizontal relationships. *See, e.g., NCAA v. Board of Regents of Oklahoma*, 468 U.S. 85 (1984). In that case, this Court refused to find that a horizontal price fixing scheme and output restrictions imposed by the NCAA on its member universities were *per se* illegal. This Court found instead that horizontal restraints were essential for the product to be available. *Id.* at 100-01. In other cases, this Court has concluded, more generally, that the *per se* rule should not be applied to restraints which have

the potential to create efficiency. *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

The erosion of *per se* liability has also occurred in cases involving vertical relationships. This Court first enunciated the clear-cut rule that all vertical price restraints were *per se* illegal under the Sherman Antitrust Act in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). More than fifty years later, this Court extended *per se* liability to encompass all vertical restrictions. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *overruled, GTE Sylvania, infra.*

By the 1980s, however, the applicability of the *per se* rule to vertical restraints was riddled with exceptions. *See, e.g., Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984) (to apply *per se* standard to dealer termination, there must be more than a mere inference of conspiracy); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58-59 (1977) (*per se* standard does not apply to vertical non price restraints).

Moreover, in *GTE Sylvania*, this Court recognized that "there may be occasional problems in differentiating vertical restrictions from horizontal restrictions." In part because of those problems, the court refused to apply a *per se* analysis. *Id.* at 58 n. 28. Rather, this Court held that:

> [w]hen anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the [Sherman] Act.

Id. at 59.

Continuing the general trend away from application of the *per se* rule, this Court recently rejected the application of *per se* analysis to vertical restraints that impact on price, an area previously subjected to the *per se* rule. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). In *Sharp*, this Court affirmed a Fifth Circuit decision which had held that "in order for a manufacturer's termination of a distributor to be illegal *per se*, it must be pursuant to a price maintenance agreement with another distributor." *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212, 1218 (5th Cir. 1986), *cert. granted*, 482 U.S. 912 (1987), *aff'd*, 485 U.S. 717 (1988). In adopting this position, this Court reasoned,

> [T]here is a *presumption in favor of a rule-of-reason standard*; . . . departure from that standard must be justified by demonstrable economic effect . . . rather than formalistic distinctions . . . .

Sharp, 485 U.S. at 726 (emphasis supplied). Clearly, *Sharp* reflects a more contemporary and clearer understanding of economic reality and an unwillingness to tolerate mechanical application of *per se* liability in antitrust law.[2]

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[2] Because vertical restraints are generally not anticompetitive, some commentators have suggested that courts could apply a rule of *per se* legality to vertical restrictions. Posner, *The Next Step in the Antitrust Treatment of Restricted Distributions: Per Se Liability*, 48 U. Chi. L. Rev. 6 (1981); Hay, *Vertical Restraints after Monsanto*, 70 Cornell L. Rev. 418 (1985). Professor Bork also believes that vertical restraint create distributive efficiencies and should, therefore, be *per se* legal. Bork, *The Antitrust Paradox* 290-91 (1978). Another approach suggested by Judge Easterbrook is to apply a presumption favoring vertical restrictions in antitrust cases, thus shifting the burden of persuasion to the plaintiff. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135 (1984).

There was no price maintenance agreement between Midco and TPB. Even if the facts could bear such a theory, where the proof is subject to two different interpretations—one a horizontal restriction of trade and the other a vertical restriction of trade—the case should, at the very least, pursuant to the *Sharp* presumption, be submitted to the trier of fact under a rule of reason analysis.

The proof below showed that Midco's actions did not cross the line separating rule of reason analysis from *per se* liability. The arrangement between Midco and other distributors and TPB and the end-users was plainly vertical. If the Government's case is believed, TPB, like a manufacturer, controlled prices submitted by its distributors and passed the prices on to the end-users. Yet, TPB also had a substantial interest in keeping the distributors' bids reasonable. It could not risk antagonizing its customers, the contractors or end-users, who were familiar with industry customs and pipe prices. If the end-users, who were aware of pipe prices, believed TPB was recommending improper pricing, not only would they reject those prices, TPB would suffer harm in the market place.

Indeed, prior to the indictment in this case, the Antitrust Division of the Justice Department had indicated that vertical price fixing agreements should *not* be treated as criminal violations of the Sherman Act. *Interview with William F. Baxter*, then Assistant Attorney General, 50 Antitrust L.J. 151, 153-54 (1981). With the indictment below, however, the Government not only broke this long standing policy but violated another cardinal rule announced in *United States v. Harriss*, 347 U.S. 612 (1953). In that case, the Court held that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.* at 617. Until the pres-

ent case, the Justice Department had repeatedly recognized the applicability of this principle to antitrust cases by stating that criminal convictions were inappropriate where a defendant's behavior involved novel legal or factual issues. *See Remarks of John J. Shenefield*, then Assistant Attorney General, Antitrust Division, before the Federal Bar Association Chapter (April 18, 1979), reprinted in [current comment—1969-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,394 (1979).

Because TPB's arrangement with its distributors was vertical and caused no demonstrable economic harm, the trial court should have submitted the rule of reason instructions. Midco strongly objected to the *per se* instruction offered, but was rebuffed. Defendants offered an instruction on the rule of reason, but the trial court wrongfully rejected that as well. At the very least, it should have submitted the case to the jury under the alternative theories of *per se* liability and rule of reason analysis. Then economic analysis rather than artificial line-drawing would have been applied.

Even while acknowledging that TPB "conceptualized" and "orchestrated" the alleged conspiracy and "collected most of the booty", the Fifth Circuit downplayed the effect of the so-called "middle-man," TPB. 962 F.2d at 473; App. A, at 16. Despite the recognition by this Court in *Sharp* that where restraints are "imposed by agreement between firms at different levels of distribution [they have traditionally been denominated] as vertical restraints," *Sharp*, 485 U.S. at 730, the Fifth Circuit did not do so. Rather, the court wrongfully disregarded the lessons of *Sharp*, ignored the essence of the governing indictment and erroneously dismissed as inconsequential the dominant, controlling role played by petitioner's customer, TPB.

In sum, the Fifth Circuit treated a unique vertical distribution arrangement in which a customer "commanded" its suppliers to sell it product at increased prices as a conventional, horizontal conspiracy. It criminalized a square peg by squeezing it into a round hole. *Sharp* has been dulled and the Fifth Circuit has not only wronged Midco, but set a new standard with serious repercussions for contracting parties everywhere.

CONCLUSION

The indictment below described a system created and directed by a pipe fabricator to solicit products and prices for itself which the fabricator, not the pipe suppliers, had previously agreed to deliver to a project engineer or architect. Despite the absence of experience which would enable a party to predict that such conduct would be condemned as an antitrust violation, *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 344 (1982), the Fifth Circuit has now criminalized such conduct. Along the way, it disregarded the presumptions of this Court, assumed anticompetitive consequences that contemporary economic analysis denies, and violated established precedents of the Third and Ninth Circuits. To re-establish this Court's guidelines for antitrust analysis, to resolve the conflict between the circuits and bring the opinion below in conformity with those of the Third and Ninth Circuits, to remove the new threat of criminality from business transactions between contacting parties, a writ of certiorari

should issue to review the judgment and opinion of the Fifth Circuit.

Dated this 25th day of August, 1992.

Respectfully submitted,

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APPENDICES

APPENDIX A

[DATED MAY 28, 1992]

[962 F.2d 465 (5th Cir. 1992)]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-2439

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALL STAR INDUSTRIES, ET AL.,

Defendants,

MIDCO PIPE & TUBE CO.,
RICHARD A. BRAZZALE,
MANNESMANN INTERNATIONAL
ALLOYS, INC. (MIA),

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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Roger L. Price, Steven L. Baron, D'Ancona & Pflaum, Chicago, Ill., for defendants-appellants.

Jeffrey S. Lynch, True, Rohde, Lynch & Sewell, Dallas, Tex., for Mannesman Intern. Alloy & Richard A. Brazzale.

Ronald G. Woods, U.S. Atty., Paula Offenhauser, Asst. U.S. Atty., Houston, Tex., Andrea Limmer, Atty., U.S. Dept. of Justice, John J. Powers, III, Asst. Chief., U.S. Dept. of Justice, Appellate Sec., Washington, D.C. for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Texas.

Before BROWN, GARWOOD, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Mannesmann International Alloys, Inc. (MIA), Midco Pipe & Tube, Inc. (Midco), and Richard A. Brazzale—former vice-president of sales at MIA—appeal their convictions for violating section 1 of the Sherman Act, 15 U.S.C. § 1, and for aiding and abetting, 18 U.S.C. § 2, by conspiring to fix the prices of specialty pipe sold through Texas Pipe Bending Company (TPB). Specifically, these defendants assert that the district court erred in instructing the jury and abused its discretion in ordering restitution. Finding no error, we affirm.

I

This case involves an alleged conspiracy between six corporations[1] and three individuals[2] to fix the prices of specialty pipe sold to TPB for purchase by TPB's custom-

[1] They are (1) TPB; (2) Capitol Pipe and Steel Products, Inc. (Capitol), (3) U.S. Metals, Inc. (U.S. Metals), (4) All Star Industries, Inc. (All Star), (5) MIA, and (6) Midco.

[2] They are (1) Carlton H. Bartula, (2) Brazzale, and (3) Ronald S. Palma.

ers under a cost-plus contractual arrangement-a violation of section 1 of the Sherman Act[3] and the aiding and abetting statute.[4] Specifically, the indictment alleges that TPB and its distributors conspired to eliminate competition on specialty pipe bids submitted to TPB for its cost-plus contracts.[5]

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[3] 15 U.S.C. § 1.

[4] 18 U.S.C. § 2.

[5] Specialty pipe is used in oil refineries and power plants to transport materials when carbon steel pipe is ineffective—for example, when the materials are corrosive or of extremely high or low temperatures. This specialty pipe often needs to be bent into shape and welded to fit the configurations of a particular project—an endeavor that is generally done more economically at a pipe fabricator's shop than at a job site. When the precise quantities of each size and grade of pipe are unknown at the time of contract, contracts with fabricators for specialty pipe generally call for the fabricators to purchase pipe from distributors on a cost-plus basis. In this situation, specialty pipe purchasers pay fabricators (1) the invoice price of the pipe plus (2) a bargained-upon percentage of that price as the fabricator's markup.

Because prices for specialty pipe are volatile and it is difficult for specialty pipe purchasers to predict their needs, purchasers expect this cost-plus arrangement to bring about a lower overall cost than the alternative—paying a pipe fabricator a fixed price which would include a contingency for assuming the market risk. Specialty pipe purchasers generally believe that the fixed price method would inflate bids to the point of making the present specialty pipe market system—that is, reliance on independent pipe fabricators who do the work off site—uneconomical. To assure that they receive competitive prices, purchasers generally require pipe fabricators to solicit and submit competitive bids from three or more distributors.

Between 1981 and 1984, there were only 5-7 of these specialty pipe distributors in the market. However, fabricators such as TPB sometimes carried their own specialty pipe inventory and were able to bid against the pipe distributors. See *infra* note 15 and accompanying text.

A

At trial, twelve alleged co-conspirators—including a former MIA sales manager, a former MIA executive vice-president, and two former Midco vice-presidents—described the conspiracy and their participation in it. According to these witnesses, when TPB was awarded a fabrication job on a cost plus basis, Bartula—TPB's head purchasing agent—decided which distributors should submit bids. These distributors included All Star, Midco, MIA, Capitol, Guyon, and U.S. Metals. Bartula or another TPB employee would then ask Palma[6] to "quarterback" the job—that is, to act as a go-between among the distributors and TPB by discussing the prospective bids, allocating various material among the bidders, and working with the bidders to decide the prices each would submit to TPB.

Specifically, Bartula or Palma would call selected bidders to inform them that (1) they would be receiving a request for a quotation on a cost-plus job, (2) Palma would quarterback the job, and (3) the job was to be handled on a "code 5", "10", or "15" basis—meaning that the job was to be rigged and TPB would receive either a five, ten, or fifteen percent kickback. The distributors then padded their bids accordingly, adding this five-to-fifteen percent onto their bids and rebating the money to TPB in the form of a "credit memo" or check. TPB and its distributors sometimes referred to this scheme as TPB's "volume discount program."

As quarterback, Palma would discuss the bidders' preferences and agree on an allocation among them of the materials needed. The bidders who were designated win-

[6] Palma worked for Capitol in 1981 and 1982, and then for his own company—All Star—in 1983 and 1984.

ners would then determine their prices. In addition to the five-to-fifteen percent added to the bid price for TPB's kickback, these bid prices included higher than normal mark-ups resulting in prices generally 20 percent—and as much as 75 percent—higher than competitive prices. Palma would then pass these inflated prices onto the other bidders who would protect them by bidding higher. Work was usually awarded according to the allocation agreed upon by the distributors.

B

TPB, Capitol, and U.S. Metals entered into plea agreements. All Star, MIA, Midco, Bartula, Brazzale, and Palma went to trial and were convicted by a jury on March 19, 1990. Judgments of conviction were entered on May 20, 1991: The district court fined each of the corporate defendants $250,000 and, as a condition of probation, ordered them jointly and severally liable for restitution in the amount of $859,935; Bartula was sentenced to three years imprisonment, with all but the first six months suspended; Brazzale and Palma received suspended sentences and were placed on probation for five years. MIA, Midco, and Brazzale appeal their convictions.

II

Defendants challenge both the district court's (A) Jury instruction and (B) its award of restitution. Defendants' jury instruction challenge fractures into assertions that the district court erred by:

(1) instructing the Jury under the per se rule analysis,

(2) refusing to instruct the jury on "rule of reason" analysis, and

(3) refusing to instruct the jury on the theories of defense (that is, good faith and lack of specific intent).

As for the district court's award of restitution, MIA asserts that the court abused its discretion by:

(1) ordering restitution for injuries outside the limitations period,

(2) failing to credit MIA for payments made to settle related civil claims, and

(3) making restitution joint and several.

A

1-2

Section 1 of the Sherman Act Provides in part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1. Despite the scope of its literal meaning, the Supreme Court has always recognized that section 1 was "intended to prohibit only *unreasonable* restraints of trade." *Business Electronics v. Sharp Electronics*, 485 U.S. 717, 723, 108 S. Ct. 1515, 1519, 99 L.Ed.2d 808 (1988) (emphasis added). Therefore, "[o]rdinarily, whether [a] particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason—that is, 'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on Competition.' " Id. (citation omitted).

However, the Court has also introduced a shortcut around case-by-case rule-of-reason analysis: the Court has found certain agreements to be so egregiously anticompetitive

"that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 7-8, 99 S. Ct. 1551, 1556, 60 L.Ed. 2d 1 (1979); see also *Business Electronics*, 485 U.S. at 723-24, 108 S. Ct. at 1519 ("Certain categories of agreements, however, have been held to be per se illegal, dispensing with the need for case-by-case evaluation.").[7] "[A]greements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the per se category." *Broadcast Music*, 441 U.S. at 8, 99 S. Ct. at 1556.[8] The district court found the

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[7] The policy undergirding this per se unreasonableness approach is to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Broadcast Music*, 441 U.S. at 8, n.11, 99 S. Ct. at 1556 n.11, *quoting Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L.Ed. 2d 545 (1958) (citations omitted). The standard test for determining application of this per se rule is whether the business practice "facially appears to be one that would always or almost always tend to restrict competition and decrease output. . . ." Id. at 19-20, 99 S. Ct. at 1562, *citing United States v. Gypsum Co.*, 438 U.S. 422, 436 n.13, 441 n.16, 98 S. Ct. 2864, 2873 n.13, 2875 n.16, 57 L.Ed. 2d 854 (1978).

[8] Id. at 9, 99 S. Ct. at 1557 ("As generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable."); *see Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647, 100 S. Ct. 1925, 1927-28, 64 L.Ed. 2d 580 (1980) (price fixing agreement among competitors is archetypal example of conduct that is illegal per se); *Northern Pac. Ry. Co.*, 356 U.S. at 5, 78 S. Ct. at 518 (price fixing is illegal per se "without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use"); *United States v. MMR Corp.*, 907 F.2d 489,

(Footnote continued on following page)

price fixing arrangement between TPB and its distributors to be such an agreement and instructed the jury accordingly, thereby rejecting the rule of reason instructions proposed by defendants.[9]

The government asserts a conspiracy among distributors to fix the price of specialty steel and pass that non-competitive price onto end users. To diminish the importance of their horizontal agreement to rig specialty steel bidding, defendants emphasize the vertical component of the conspiracy—that is, TPB's involvement—by proffering a hostage ("TPB made us do it") theory:

> The unique fact of this case is that the pipe distributors did not, as in a conventional case, come together voluntarily to fix prices on products to be sold to their customers. Rather, directions flowed the other way. It was the suppliers' customer, Texas Pipe Bending . . . , which directed its suppliers in the scheme. TPB dictated the prices in the bids it expected to

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[8] *continued*

495 (5th Cir.) (Where defendants were charged with bid rigging in violation of Sherman Act, holding that "[i]t is enough that the government shows that the defendants accepted an invitation to join in a conspiracy whose object was unlawfully restraining trade.") (citation omitted), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1388, 113 L.Ed. 2d 445 (1990); *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977) ("An agreement that one company would not submit a bid lower than another is price fixing of the simplest kind and is a *per se* violation. . . .") (citation omitted). Thus, "[i]n cases involving behavior such as bid rigging . . . the Sherman Act will be read as simply saying: 'An agreement among competitors to rig bids is illegal,' " *United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir.), *cert. denied*, 454 U.S. 1083, 102 S. Ct. 639, 70 L.Ed. 2d 617 (1981), *quoting United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir.), *cert. denied*, 444 U.S. 840, 100 S. Ct. 79 (1979).

[9] The district court's jury instructions are discussed and quoted *infra* at notes 19-20 and accompanying text.

> receive from suppliers. TPB then purchased and took title to the goods, which were passed on to the end users.[10]

In sum, defendants would have us believe that (1) they dealt only with TPB and not with each other, (2) TPB told them what to bid and, for the sake of staying in business, they did what they were told, and, (3) after their deals were done, TPB went forth on its own to cheat its customers, the specialty pipe end users, with inflated prices.[11]

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[10] Reply Brief for Appellant Midco Pipe & Tube, Inc. at 3, *United States v. All Star*, No. 91-2439 (5th Cir. filed Dec. 12, 1991) ["Midco Reply Brief"]. Defendants rely upon *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440 (3d Cir.), *cert. denied*, 439 U.S. 866, 99 S. Ct. 191, 58 L.Ed. 2d 176 (1978), to argue that this case simply involves "sham bidding" orchestrated by a buyer, and, therefore, is not a per se violation of the Sherman Act. Specifically, defendants cite *Sitkin*, 575 F.2d at 447, for the proposition that the mere existence of sham bidding does not create a presumptive violation of the Sherman Act, and *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1196 (3d Cir. 1984), *cert. denied sub nom.*, 470 U.S. 1029, 105 S. Ct. 1397, 84 L.Ed. 2d 785 (1985), for the proposition that no antitrust violation can arise if a customer—defendants allege that TPB, not the specialty steel end users, was their customer—acquiesces in the transaction or conspiracy. We find *Sitkin* easily distinguishable, however, for in that case there was no horizontal collusion among competing buyers or sellers. *See Sitkin*, 575 F.2d at 446-48. As the court explained, "The price-fixing within the scope of the per se prohibition of § 1 . . . . is an agreement to fix the price to be *charged in transactions with third parties, not between the contracting parties themselves.*" Id. at 446 (emphasis added).

[11] Specifically, MIA and Brazzale assert that:

> The indictment describes a scheme whereby TPB, a customer of Mannesmann and other pipe distributors, directed them to submit prearranged bids to it for its use in satisfying cost-plus contracts between TPB and its own customers—the "end users"—when the contracts require competitive bidding. No antitrust injury results from this conduct.
>
> * * *

(Footnote continued on following page)

However, the record stages a very different scenario: Where specialty pipe distributors, TPB, and specialty pipe end users were united by underlying cost-plus contracts, distributors who were normally horizontal competitors conspired to rig their bids with the *explicit intention* of inflating the cost aspect of cost-plus contracts and deceiving specialty steel end users.[12] The conspiracy depended

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[11] *continued*

> What the government has done is turn a business tort by TPB against its customers into a criminal antitrust conspiracy against those customers by parties who did not contract with them but only with TPB, parties who did not tell TPB what to do with its pricing and who had no relationship with TPB's customers.

Brief of Defendants-Appellants Mannesmann International Alloys, Inc. and Richard A. Brazzale at 10, 17, *United States v. All Star Industries*, No. 91-2439 (5th Cir. filed Oct. 16, 1991) ["MIA Brief"].

Midco asserts that, "[b]ecause TPB's arrangement with its distributors was vertical [—that is, TPB purchased specialty pipe as [Midco's] customer, fabricated it, and then resold it to the end users who were TPB customers—] and caused no demonstrable economic harm, the [district] court should have submitted [their] rule of reason instructions. At the very least, it should have submitted the case to the jury under the alternative theories of per se liability and rule of reason analysis." Brief for Appellant Midco Pipe & Tube at 24, *United States v. All Star Industries*, No. 91-2439 (5th Cir. filed Oct. 11, 1991) ["Midco Brief"]. Midco relies upon *Business Electronics v. Sharp Electronics*, 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988), for the proposition that the agreement between specialty pipe distributors and TPB was vertical, thereby making the per se rule inapplicable. However, we find *Sharp* easily distinguishable since that case involved a wholly vertical restraint—an agreement between a manufacturer and a dealer to terminate another dealer—without any agreement on price or price levels. Id. at 435-36, 108 S. Ct. at 1525 ("In sum, economic analysis supports the view, and no precedent opposes it, that a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels.").

[12] The record establishes that defendant distributors were fully aware of their role in the overall scheme contrived by TPB—that

(Footnote continued on following page)

[12] *continued*

is, they knew they were rigging bids only on cost-plus contracts that required TPB to obtain competitive bids and also required the end user-buyers to pay the full rigged priced for the specialty pipe plus TPB's markup. See *infra* notes 13-15 and accompanying text. As for the involvement of Midco and MIA in this conspiracy, consider the following:

—MIA's involvement in the conspiracy is captured by the testimony of Lorne Van Stone, former executive vice-president of MIA:

Q And what did Mr. Brazzale explain that he and Mr. Palma did to set price levels?

A Well, they told me that they would discuss the job and decide which items that International Alloys was going to get and that we would protect prices for the other competitors and we would get our share of the order.

Q And what did you understand "protect other competitors" to mean?

A To keep our prices high to protect their prices so that they would receive the job.

Q So would you explain to us how that would work as a mechanical matter on a Mannesmann bid as you understand that process?

A We would sell many times above our usual prices in order to protect the prices in the marketplace at Texas Pipe Bending. And where we were picked to take certain items, we would be low on those and somebody else would protect our prices.

* * *

A My understanding was the three or four times that I remember that we got part of the jobs, not all of the jobs, we got part of the jobs after [Mr. Brazzale] would have had a meeting with Mr. Palma. That is my understanding.

* * *

Q Did Mr. Brazzale ever explain to you how it came to be that Mannesmann would win items on some of these bids to Texas Pipe Bending where he and Mr. Palma were talking?

* * *

A They would get the other distributors to raise their prices to protect ours on the items that we were to be given.

Q And did Mannesmann protect the other distributors on the rest of the items?

(Footnote continued on following page)

[12] *continued*

A Yes.

* * *

Q Did Mr. Brazzale ever tell you the names of other competitors whose prices Mannesmann was protecting?
A Yes.
Q Whose names did he tell you?
A U.S. Metals

* * *

Q Any other company?
A Gulf Alloys.
Q Any other company?
A Charles F. Guyon Alloys.

Record on Appeal, vol. 37, at 8-55, 8-61 to 8-64, *United States v. All Star Industries*, No. 91-2439 (5th Cir. filed Aug. 6, 1991) ["Record on Appeal"].

—The record also contains testimony regarding Midco's involvement from Sam Rossetti, Midco's former vice-president and sales manager:

Q After Midco entered into this agreement with All Star and Mr. Palma, was there a change in Midco's ability to make sales to the Texas Pipe Bending Company?
A Yes, sir, very much so.
Q And what was that change?
A We had a hundred percent increase in business over and above what we used to do before.
Q Not to quibble with you, but if you had one sale before, a hundred percent increase would make it two sales. How big an increase was it?
A Astronomical.

* * *

Q Did Midco pay—make payments to Texas Pipe Bending during the '83-'84 period pursuant to the volume discount arrangement?
A Yes, sir.

* * *

Q Would you describe for us the substance or the gist of these calls that you had with Mr. Palma?
A He would tell me whether or not they were hard dollar jobs or whether or not they were 10 or 15 percent jobs.

* * *

(Footnote continued on following page)

[12] *continued*

Q Were you told the amount of the quality discount before or after Midco made up its bid to Texas Pipe Bending?
A Before.
Q Why were you told before?
A You would have to know how much to add into the price.
Q What do you mean you would have to know how much to add into the price?
A If we were giving Texas Pipe Bending 10 or 15 percent, we would certainly have to cover it in the price we were quoting.
Q Did Midco—was there any profitability into the Midco quotes to Texas Pipe Bending for Midco in addition to whatever you were putting in for the Texas Pipe Bending Company?
A Yes.

* * *

Q On the bids that Midco submitted to the Texas Pipe Bending Company during the 1983-'84 period, did the Midco bids show on their face the amount of the discount that was included?
A No.
Q Did the Midco bids in '83-'84 show on their face that All Star and Mr. Palma were acting as your sales agent?
A No.

* * *

Q Would you explain for us what that notation means?
A Well, Texas Pipe Bending would be given 15 percent of the selling price of the order. And 25 percent of the gross profit after all expenses would be paid to All Star Industries.
Q . . . was that a notation that went on documents that left the Midco Company?
A No.

* * *

A [Mr. Palma] would tell me to protect certain prices on certain bids.

* * *

Q And what did you do with the information when Mr. Palma told you to protect certain bids?
A I raised the prices that we were bidding.

Record on Appeal, vol. 38, at 9-163 to 9-166, 9-168 to 9-172; *see also* Record on Appeal, vol. 39, at 10-31 to 10-32:

(Footnote continued on following page)

upon distributor cooperation and participation, and the distributors obliged:

> —Distributors knew that TPB was required to submit at least three competitive bids to its customers for their approval, and they took pains to make these bids look legitimate to the end users.[13]

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[12] *continued*

Q When Midco put in a bid with a protect number, was that a number that Midco chose as a competitive number?
A No.
Q Where did Midco get that number to bid above?
A From Mr. Palma.

—The testimony of Robert Cohn, Midco's former executive vice-president and president, further substantiates Midco's participation in the conspiracy:

Q What use did you make of the information that Mr. Palma gave you about protecting prices?
A We protected the prices by quoting a higher one than was mentioned.

* * *

Q How accurate was Mr. Palma's information about which items Midco would get and not get?
A I can never remember them being in error.

* * *

Q Did there come a point in time—did you ever learn whether or not All Star was bidding on the same jobs as Midco?
A We did. I did.

* * *

Q Why did you continue to use All Star's services—excuse me, why did you continue to use Mr. Palma's and All Star's services after you had learned those factors?
A Because Midco—and we felt that whatever business we might get would be more than we would get otherwise.

Record on Appeal, vol. 39, at 10-40 to 10-44.

[13] This is substantiated by the testimony of James Dooner, who was employed by Capitol from 1966 through 1969 and its competitor, Guyon, from 1969 through 1985 as a sales supervisor for all southwestern states:

Q Now, Mr. Dooner, did you have some expectation about what percentage of the sales on rigged bids to TPB you were going to win?

(Footnote continued on following page)

—Distributors did not allocate jobs exactly evenly because knew that would look suspicious, meaning that the distributors made a deliberate effort to maintain the appearance of competitive bidding. *See supra* note 13.

—Even on contracts for items they knew they would not be getting because they were protecting the prices of other bidders, the distributors would "develop" their prices by calling manufacturers to give them the impression that distributors were preparing competitive bids.[14]

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[13] *continued*

A On a specific order?
Q Yes.
A The percentage varied. But the answer is yes because there are some items we didn't receive at all.
Q Did you expect to get a share equal to the other distributors on each sale?
A Yes.

* * *

Q Did you always get—if there were three bidders, did you always get 33 percent of the sales of a rigged bid?
A No.
Q Why not?
A The percentage varied because being an equal percentage would look as if it was pre-done.

Record on Appeal, vol. 32, at 3-56 to 3-58.

[14] This effort to make end users believe that the distributors' bidding was competitive is described by the testimony of Steve Scott, president of U.S. Metals:

Q If you would just tell the jury if you ever did anything, you personally ever did anything to make it look like you were competing on the jobs where quarterbacking was going on?
A By developing prices with all the manufacturers.
Q You developed prices with all the manufacturers, that is what you are saying?
A Yes.
Q Why would—what was the purpose of that?
A Two-fold. To have an idea of the overall value of the project. And give the manufacturers that appearance that we were developing competitive prices on the whole job.

(Footnote continued on following page)

Rather than merely being these distributors' customer who then went on to cheat its own customers, TPB was the distributors' conduit for passing their inflated, non-competitive specialty steel bids onto unsuspecting end users. Moreover, in at least one instance, TPB was also the distributors' horizontal "competitor" who benefited from the conspiracy at their level.[15] Accordingly, we find that defendants cannot escape the per se rule simply because their conspiracy depended upon the participation of a "middle-man", even if that middleman conceptualized the conspiracy, orchestrated it by bringing the distributors together around contracts it held with its buyers, and collected most of the booty.[16] We find, therefore, that the

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[14] *continued*

Q Now, Mr. Scott, you personally worked on bids to Texas Pipe Bending on sales that were quarterbacked; is that right?

A That is correct.

Q And you also submitted bids to Texas Pipe Bending on sales that weren't quarterbacked; is that right?

A That is correct.

Record on Appeal, vol. 40, at 11-126. Therefore, while the "winning bidder" did not sell its product directly to the end user, it knew who its end user was and that it had successfully deceived that end user into paying a rigged price for its product. Id.

[15] Government Exhibit 13a is a TPB breakdown listing materials needed to fulfill its cost-plus contracts with a "G", "C", or "M" beside the entries to indicate which company—Guyon, Capitol, or MIA—the work was designated to. Some of the entries are flagged "TPB stock protect", meaning that TPB had the materials in its inventory, would bid along with the distributors, and that bidding for these materials would be rigged so that TPB would win.

[16] The government argues that the case before us is analogous to *United States v. MMR Corp.*, 907 F.2d 489 (5th Cir. 1990), *cert. denied sub nom.*, ____ U.S. ____, 111 S. Ct. 1388, 113 L.Ed. 2d 445 (1991)—a case in which defendants were also convicted of conspiracy to rig bids in violation of the Sherman Act after the district court applied the per se liability rule. There, we considered

(Footnote continued on following page)

district court did not err by instructing the jury in accordance with the per se rule and refusing defendants' rule of reason instruction.

3

Defendants also challenge the district court's jury instruction on the grounds that the district court should have instructed the jury on their theories of defense—that is, good faith and lack of specific intent. Specifically, they argue that, "[e]ven assuming, hypothetically, that this case involves a per se violation of the [S]herman [A]ct, there still must be evidence that the defendant intended to commit the specific intent offense charged."[17]

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[16] *continued*

a similar contention: Defendants argued that, since MMR lacked the bonding capacity to successfully bid the project at issue and, therefore, could not successfully compete with other conspirators, MMR was not an actual competitor and per se liability rules did not apply. *Id.* at 496-97. We rejected that contention, holding that:

> Even if MMR is deemed not to be an actual or potential competitor of Fischbach and the other companies; the conspiracy was not a meaningless conspiracy between noncompetitors since [other actors] were competitors. . . . . [A] noncompetitor can join a Sherman Act bid-rigging conspiracy among competitors. If there is a horizontal agreement between A and B, there is no reason why others joining that conspiracy must be competitors . . . . Second, the facts of this case illustrate how a company, although arguably unable in fact to carry out its competitive threat . . . can nonetheless further a conspiracy among competitors.

Id. at 498. Applying our MMR holding to the case at issue, even if TPB is deemed not to be an actual competitor, the bid-rigging conspiracy was not a meaningless conspiracy between non-competitors. The distributors were horizontal competitors and, at least on one occasion, TPB bidded along with them. See supra note 15.

[17] Midco Reply Brief at 16.

We recognize that, "[w]hen a defendant properly requests an instruction on a theory of defense that is supported by some evidence, it is reversible error not to adequately present the theory." *United States v. Johnson*, 872 F.2d 612, 622 (5th Cir. 1989) (reviewing instruction as a whole and holding that instruction on defense theory of entrapment was adequate); *see also United States v. Schmick*, 904 F.2d 936, 943 (5th Cir. 1990) ("It has long been well established in this Circuit that it is reversible error to refuse a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused innocent.") (citations omitted), *cert. denied sub nom.*, ____ U.S. ____, 111 S. Ct. 782, 112 L. Ed. 845 (1991). However, when considering such a jury instruction challenge on appeal, we read the district court's instruction as a whole to determine whether it accurately reflects the law. *See United States v. Daniel*, 957 F.2d 162, 169 (5th Cir. 1992) (viewing jury instruction as a whole and holding that lack of good faith instruction and inclusion of instruction on deliberate ignorance does not constitute reversible error); *United States v. Hagmann*, 950 F.2d 175, 180 (5th Cir. 1992) ("When a charge is challenged on appeal, we evaluate it in its entirety, looking to see whether the charge as a whole was correct."); *United States v. Featherson*, 949 F.2d 770, 777 (5th Cir. 1991) ("The standard of review for jury instructions is usually whether the court's charge, as a whole, is a correct statement of the law and plainly instructs the jurors as to the principles of law applicable to the fact issues confronting them."), *cert. denied sub nom.*, ____ U.S. ____, 112 S. Ct. 1771, 118 L. Ed. 2d 430 (1992).

We have found that it was proper for the district court to instruct the jury in accordance with the per se rule.

See supra Part II A.1-2. Therefore, the government's only burden was to prove that the per se agreement alleged was in fact made and that defendants knowingly and intentionally joined that agreement.[18]

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[18] A price fixing conspiracy under the Sherman Act is not a crime requiring proof of a "specific intent" to restrain trade or to violate the law. *See American Tobacco Co. v. United States*, 328 U.S. 781, 809-10, 66 S. Ct. 1125, 1139, 90 L.Ed. 1575 (1946) ("No formal agreement is necessary to constitute an unlawful conspiracy. . . Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified."); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227, 59 S. Ct. 467, 474, 83 L.Ed. 610 (1939) ("Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish unlawful conspiracy under the Sherman Act."). The intent element of a per se offense is established by evidence that the defendant agreed to engage in conduct that is per se illegal; the government is not required to prove that the defendant knew his actions were illegal or that he specifically intended to restrain trade or to violate the law. *See United States v. MMR Corp.*, 907 F.2d 489, 495 (5th Cir. 1990), *cert. denied sub nom.*, ____ U.S. ____, 111 S. Ct. 1388 113 L.Ed. 2d 445 (1991):

> The government . . . is not required to prove a formal, express agreement with all the terms precisely set out and clearly understood by the conspirators. . . . It is enough that the government shows that the defendants accepted an invitation to join in a conspiracy whose object was unlawfully restraining trade.

See also United States v. Young Brothers, Inc., 728 F.2d 682, 687 (5th Cir.) ("In order to prove that appellant actually intended to enter into the bid rigging conspiracy, the government was required to show that appellant knowingly joined or participated in the conspiracy."), *cert. denied*, 469 U.S. 881, 105 S. Ct. 246, 83 L.Ed. 2d 184 (1984); *United States v. Broun*, 936 F.2d 1042, 1045-46 (9th Cir. 1991) (holding that district court did not err in "holding that it was unnecessary to instruct the jury that intent to produce anticompetitive effects is an element of the offense of which [defendants] were convicted."); *United States v. W.F. Brinkley & Sons*

(Footnote continued on following page)

The district court instructed the jury as follows:

> To establish the required intent the Government must prove beyond a reasonable doubt that the defendants knowingly and willfully did something which the law forbids. In this case, that means that the Government must prove beyond a reasonable doubt that the defendants knowingly and willfully formed, joined or participated in a combination or conspiracy to rig bids. Since a combination or conspiracy to rig bids is unreasonable and illegal as a matter of law, the Government does not have to prove that the defendants specifically intended to unreasonably restrain trade or that such conduct is an unreasonable restraint of trade.[19]

We find that, read as whole, this instruction accurately reflects the law—that is, the district court correctly instructed the jury that the government had to establish beyond a reasonable doubt that (1) the bid rigging conspiracy charged in the indictment was knowingly and willfully formed, (2) each defendant knowingly and willfully became a member of that conspiracy, and (3) the conspiracy affected or occurred in the flow of interstate com-

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[18] *continued*
Constr. Co., 783 F.2d 1157, 1161-62 (4th Cir. 1986) ("The word 'knowingly' as that term has been used from time to time in these instructions means that the act was done voluntarily and intentionally and not because of mistake or accident."); *United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir.) ("In cases involving behavior such as bid rigging . . . the Sherman Act will be read as simply saying: 'An agreement among competitors to rig bids is illegal.' ") (citation omitted), *cert. denied*, 454 U.S. 1083, 102 S. Ct. 639, 70 L.Ed. 2d 617 (1981).

[19] Record Excerpts of Defendants-Appellants at tab 30, *United States v. All Star Industries, Inc.*, No. 91-2439 (5th Cir. filed Oct. 16, 1991) (jury instruction No. 12) ["Record Excerpts"].

merce.[20] Moreover, because the bid-rigging agreement alleged by the government was per se illegal, defendants' other theories of defense—theories incorporated in defendants' proposed instructions which the district court rejected—were irrelevant, and we find that the district court did not err in rejecting them.[21]

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[20] *See* Jury Instruction No. 9, in Record Excerpts at tab 30. The district court also instructed the jury as to: the elements of a conspiracy (Jury Instruction No. 10) ("A conspiracy under Section I of the Sherman Act is an unlawful agreement by two or more persons or corporations to accomplish a common objective which would result in an unreasonable restraint of interstate commerce."); what constitutes "knowing" and "willful" and that "the Government must prove beyond a reasonable doubt that the defendants knowingly and willfully formed, joined or participated in a combination or conspiracy to rig bids (Jury Instruction Nos. 11-12); what constitutes bid rigging and the significance of such a finding (Jury Instruction No. 13) ("In this case, if you find beyond a reasonable doubt that a defendant was a member of a conspiracy to rig bids as alleged in the indictment, then you need not decide whether such conspiracy was reasonable or unreasonable because . . . an agreement among competitors not to compete for contracts by submitting collusive bids is per se unreasonable and a violation of the Sherman Act."); that good faith is no defense (Jury Instruction No. 15: "A conspiracy to rig bids in or affecting interstate trade and commerce is unlawful, even though the conspiracy may be formed or engaged in for what appear to the conspirators to be laudable motives.") (Jury Instruction No. 20: ". . . the fact that a defendant may have believed, in good faith, that what was being done was not unlawful would not be a defense."). *Id.*

[21] Defendants assert that their actions caused no economic harm. Specifically, they assert that, "if the end users were unhappy with the bids that TPB solicited, they could reject them. Some did. If they were unhappy with the entire program, they could have negotiated for a fixed price contract. If offended by TPB's allocation, they could have proceeded against TPB for breach of contract." Midco Brief at 13. Defendants also assert that, even if end users were harmed, the distributors did not benefit from the price-rigging arrangement since TPB collected all the conspiracy profits: "If a price is raised 15% and then a 15% rebate is made, the

(Footnote continued on following page)

[21] *continued*

supplier would make no more profit than if none of that occurred." Midco Reply Brief at 8. They also assert that their "involvement in the alleged conspiracy . . . occurred after the end users had already reaped the benefits of competition, the negotiated low percentage plus on their cost-plus contracts. Therefore Midco's acts were not likely to cause harm, not plainly anticompetitive and not properly subject to per se analysis." *Id.* at 13.

Where there is a per se illegal price-fixing agreement, it is no defense that the agreement at issue did not have anticompetitive effects, or that defendant's motives were benevolent. *See N.C.A.A. v. Board of Regents of Univ. of Okl.*, 468 U.S. 85, 109-110, 104 S. Ct. 2948, 2964-65, 82 L.Ed. 2d 70, (1984) (Holding that, "when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.' ") (citation omitted); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59, 84 L.Ed. 1/29 60 S. Ct. 811, 845 n.59 (1940) (citation omitted):

> But that does not mean that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act. That would be true if power or ability to commit an offense was necessary in order to convict a person of conspiring to commit it. But it is well established that a person "may be guilty of conspiring, although incapable of committing the objective offense."

See also United States v. Cargo Service Stations, Inc., 657 F.2d 676, 683-84 (5th Cir. 1981), *cert. denied*, 455 U.S. 1017, 102 S. Ct. 1712, 72 L.Ed. 2d 135 (1982) (defendants need only knowingly and intentionally join conspiracy to rig bids) (per se rule condemns conspiracies never implemented, as well as those that fail to achieve their objectives and produce no anticompetitive effects); *id.* at 683 ("We think it follows that if price fixing is inevitably an unreasonably restraint of trade, the intent to fix prices is equivalent to the intent to unreasonably restrain trade.").

Moreover, there is evidence in the record that distributors ended up charging end users prices inflated 10 to 15 percent above competitive prices. Record on Appeal, vol. 37, at 8-34 (testimony of Bruce Painchaud, an MIA employee from 1978 through 1987). Although, as pointed out by defendants, the bidding arrangement between end users and TPB allowed the end users to reject the distributors' bids, we cannot fault the end users for accepting them. The end users took precautions to insure that the specialty steel bids incorporated into TPB contracts were competitive by requiring TPB to provide at least three bids—precautions which were overcome by conspiracy.

(Footnote continued on following page)

[21] *continued*

And finally, although TPB may have reaped most of the rewards from this markup, the distributors still benefited from the bid-rigging arrangement in that their participation guaranteed them a share of the contracts:

—Consider the testimony of Robert Cohn, executive vice-president and then president of Midco during the years 1981-1984:

Q Why did you protect those prices as requested by Mr. Palma?

A Because Mr. Palma was our agent and he was on the scene and we assumed he knew what he was doing and we followed his instructions.

* * *

Q Why did protecting another competitor's price help Midco get business with Texas Pipe?

A Well, I don't believe that every order would go to one single company because we, Midco couldn't get every piece of business. And someone else might have had a better inventory of a commodity or a better price.

Record on Appeal, vol. 39, 10-41.

—Rossetti's testimony further substantiates that the distributors benefited from the conspiracy arrangement:

Q Why did Midco put down protected numbers on some of its bids to Texas Pipe Bending Company?

A Well, we were told to, and the only way we would get business was by participating on this basis.

* * *

Q How did you know this was the only way you would get business?

A Because this was the way it was happening and we were getting it on that basis.

Record on Appeal, vol. 38, at 9-171 to 9-172; *id.* at 9-163 (quoted more extensively supra note 12):

Q After Midco entered into this agreement with All Star and Mr. Palma, was there a change in Midco's ability to make sales to the Texas Pipe Bending Co.?

* * *

Q Not to quibble with you, but if you had one sale before, a hundred percent increase would make it two sales. How big an increase was it?

A Astronomical.

B

As a condition of probation, the district court ordered the corporate defendants jointly and severally liable for restitution to the victims of their conspiracy in the amount of $859,935.[22] MIA now asserts that the district court abused its discretion by:

(1) ordering restitution that covers injuries occurring outside the limitations period for antitrust violations,

(2) failing to credit Mannesmann for payments made to settle civil claims involving the same conduct and parties, and

(3) making restitution a joint and several obligation against Mannesmann since Mannesmann was not involved in several projects for which restitution was awarded.

1

MIA raises an assertion before this court that it did not raise below—that, because the statute of limitations for antitrust violations is five years, MIA cannot be made to pay restitution for losses occurring more than five years before the return of the indictment. Because this contention was not raised below, we review it only for plain error—that is, we look to see whether "our failure

[22] The district court ordered this restitution pursuant to section 3651 of the Probation Act. 18 U.S.C. § 3651 (1985). While this section has been repealed, the Probation Act which predated the Sentencing Reform Act still applies to offenses committed before November 1, 1987. *See United States v. Balboa*, 893 F.2d 703, 706 (5th Cir. 1990) (holding that, although probation statute was repealed by Sentencing Reform Act, old provision continued to apply to offenses which occurred before effective date of Act, Nov. 1, 1987).

to consider the question results in manifest injustice.' " *United States v. Vonsteen*, 950 F.2d 1086, 1092 (5th 1992) (citation omitted); *see United States v. Sherbak*, 950 F.2d 1095, 1101 (5th Cir. 1992) ("[I]ssues raised for the first time on appeal 'are not reviewable by this [c]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice.") (citations omitted).[23]

A Sherman Act conspiracy is a partnership in crime that continues until all its objectives have been accomplished or abandoned. *See United States v. Kissel*, 218 U.S. 601, 607-08, 31 S. Ct. 124, 126, 54 L.Ed. 1168 (1910) ("A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business, and will continue their combined efforts to drive the competitor out until they succeed.") ("A conspiracy is a partnership in criminal purposes . . . [and] an overt act of one partner may be the act of all without any new agreement specifically directed to that act."). MIA was convicted of participating in a single continuing conspiracy that began more than five years before the indictment was returned, but which did not end until 1984—a time within the five-year period of limitations. Under the Probation Act,[24] the only limits on restitution are that repayment must relate (i) to the particular offense of which the defendant was convicted

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[23] *See also United States v. Campbell*, 942 F.2d 890, 894 n.2 (5th Cir. 1991) ("Because Campbell raises this claim for the first time on appeal, the issue is deemed waived."); *United States v. Jackson*, 700 F.2d 181, 190 (5th Cir.), *cert. denied*, 464 U.S. 842, 104 S. Ct. 139 (1983) ("We have long held that, absent a showing of manifest injustice, a litigant may not raise a theory on appeal that was not presented to the district court.").

[24] *See supra* note 22.

and (ii) to the actual losses suffered by the victim. *See United States v. Boswell*, 565 F.2d 1338, 1343 (5th Cir.) ("As a condition of probation a district court undoubtedly has the authority to require that a defendant make restitution to injured parties for the *actual loss* or damage caused by the offense for which he stands convicted . . .") (citations omitted) (emphasis in original), *cert. denied*, 439 U.S. 819, 99 S. Ct. 81, 58 L.Ed 2d 110 (1978); *see also United States v. Stuver*, 845 F.2d 73, 76 (4th Cir. 1988) (holding that precise amount of loss for restitution purposes must be legally determined in the underlying criminal proceeding); *United States v. Johnson*, 700 F.2d 699, 701 (11th Cir. 1983) ("The amount of restitution cannot exceed the actual losses flowing from the offense for which the defendant had been convicted."). The restitution order in this case did not exceed those bounds and, therefore, does not constitute "manifest injustice."

2

MIA also claims that the restitution order should be reduced by the amount of money MIA paid to settle a civil class action suit alleging "the same form of conspiracy for which Mannesmann was convicted in this case."[25] We disagree.

While a court may offset restitution in a criminal case by the amount of a civil settlement to avoid double recovery by victims, the availability of such an offset

> depends upon what payment was made in the settlement, whether the claims settled involved the same acts of the defendants as those that are predicates

[25] MIA Brief at 28.

> of their criminal convictions, and whether the payment satisfies the penal purposes the district court sought to impose.

United States v. Rico Industries, Inc., 854 F.2d 710, 715 (5th Cir. 1988), *cert. denied*, 489 U.S. 1078, 109 S. Ct. 1529, 103 L.Ed.2d 834 (1989). In the civil case, plaintiffs alleged a 20-year price fixing conspiracy beginning in 1966, that affected hundreds of projects, fabricators, engineering companies, and end users.[26] The criminal case at issue concerns a four-year bid-rigging conspiracy involving sales made through a single fabricator, TPB. Only two of the 28 defendants named in the civil suit—MIA and Guyon—were involved in the criminal conspiracy. Most importantly, in settling its civil case, MIA paid a total of $814,000 to a significantly broader class of victims for a significantly broader number of projects, and MIA has offered no accounting to show how the victims of its criminal conspiracy received restitution through that civil conspiracy settlement.[27] Accordingly, we find no reason to diminish the amount of the district court's restitution order.

3

Finally, MIA asserts that, since its involvement in the conspiracy was limited, the district court's award of joint restitution is patently unfair to MIA. Specifically, MIA argues that:

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[26] Record Excerpts at tab 33.

[27] MIA's civil settlement does not limit MIA's payments to victims injured by bid rigging in this criminal case; rather, that settlement extends to all purchasers of specialty steel piping material in the United States who purchased under cost-plus contracts between 1966 and 1985 from numerous fabricators in addition to TPB. Record Excerpts at tab 34, pp. 3-4; MIA Brief at 28.

> [i]f MIA were a major player in the conspiracy, it would have been involved in a larger share of the number of allegedly rigged inquiries. The government introduced evidence of bids on 72 different projects. MIA submitted a total of eleven (11) bids on all of the projects. The 72 projects ultimately became jobs. The evidence at trial indicated that MIA participated in only eight total jobs. . . . In short, the government attempts to place responsibility on MIA's shoulders for a volume of commerce that exceeded $5,000,000. The projects for which MIA allegedly sold pipe had a total of just $1,842,693 in volume of commerce allegedly affected by the conspiracy.[28]

MIA's assertion is based on the claim that, while it is financially able to pay and the other defendants are not, the other defendants' culpability is demonstrably greater.

The government charged, and the jury found, that defendants engaged in a single, continuing conspiracy to rig bids on certain cost-plus contracts between 1981 and 1984. It is well-established that, as a participant in this conspiracy, MIA is legally liable for all the acts of its co-conspirators in furtherance of this crime. *See United States v. Kissel*, 218 U.S. 601, 608, 31 S. Ct. 124, 126, 54 L.Ed. 1168 (1910) ("[T]he conspiracy continues up to the time of abandonment or success.") ("A conspiracy is a partnership in criminal purposes . . . [and] an overt act of one partner may be the act of all without any new agreement specifically directed to that act."); *see also Hyde v. United States*, 225 U.S. 347, 369, 32 S. Ct. 793, 803, 56 L. Ed. 1114 (1912) (the liability of an individual conspirator con-

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[28] MIA Reply Brief of Defendants-Appellants Mannesmann International Alloys, Inc. and Richard A. Brazzale at 10, *United States v. All Star Industries, Inc.*, No. 91-2439 (5th Cir. filed Dec. 13, 1991) (citations and footnotes omitted).

tinues until the conspiracy accomplishes its goals or that conspirator withdraws, the latter of which requires an affirmative action). Accordingly, the district court did not abuse its discretion in holding MIA jointly and severally liable for all losses to the victims of the four-year conspiracy proved at trial. *See United States v. Haile*, 795 F.2d 489, 491 (5th Cir. 1986) (Section 3651 of the Probation Act "gives broad authority to district courts to impose conditions of probation that in the judgment of the sentencing judge serve to rehabilitate the criminal or secure compliance with court orders, and otherwise are in the public Interest.") (holding, however, that Probation Act precludes monetary penalties other than those enumerated in the statute); *United States v. Van Cauwenberghe*, 827 F.2d 424, 435 (9th Cir. 1987) (holding that joint and several liability for entire actual loss could have been imposed on each fraud defendant as condition of probation), *cert. denied*, 484 U.S. 1042, 108 S. Ct. 773, 98 L.Ed. 2d 859 (1988); *United States v. Tzakis*, 736 F.2d 867, 871 (2d Cir. 1984) (holding that district court did not abuse its discretion by imposing on defendant, as condition of probation, joint and several liability with codefendant for restitution of full amount of losses caused by their crime); *see also United States v. Hand*, 863 F.2d 1100, 1106 (3d Cir. 1988) (Holding that, in ordering restitution under the Victim & Witness Protection Act, the fact that burden of restitution lay entirely on one defendant where two co-defendants were equally culpable did not offend Constitution and "certainly . . . did not constitute an abuse of discretion.").

III

For the foregoing reasons, we AFFIRM.

APPENDIX B

[DATED MAY 10, 1991]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA

v.

JUDGMENT IN
A CRIMINAL CASE

MIDCO PIPE AND TUBE, INC.
c/o Roger L. Price
31st National Plaza
Chicago, Illinois 60602

Case Number:
H-88-00029-03

(Name and Address
of Defendant)

_____
Attorney for
Defendant

THE DEFENDANT ENTERED A PLEA OF:
[☐ guilty ☐ nolo contendere] as to count(s) ____, and
☒ not guilty as to count 1.

THERE WAS A:
[☐ finding ☒ verdict] of guilty as to count 1 on March 19, 1990.
The offense was committed during 1981, 1982, 1983, and 1984.

THERE WAS A:
[☐ finding ☐ verdict] of not guilty as to count(s) ____.
☐ judgment of acquittal as to count(s) ____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Restraint of Trade - Bid Rigging, in violation of 15:1, as charged in the one count indictment.

IT IS THE JUDGMENT OF THIS COURT THAT: as to Count 1, the imposition of sentence is suspended and the corporation is placed on probation without supervision, for a period of FIVE (5) YEARS.

Further, a fine of $250,000 is imposed, payable during the period of probation, on a schedule developed by the U. S. Probation Office.

As a special condition of probation, the corporation is ordered held jointly and severally liable with the two remaining corporate defendants, All Star Industries and Mannesmann International Alloys, Inc., for payment of restitution in the amount of $859,935, to be paid within the first year of probation.

Within thirty (30) days of this order the Government is to file a statement with the Court and the probation office as to the identity of the victims, proposed amount of restitution to be paid to each victim and the method of payment, at which time this Court will enter a final restitution order.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

* * * * *

IT IS FURTHER ORDERED THAT counts N/A are DISMISSED on the motion of the United States, Clerk, United States District Court, Attention: Finance, P. O. Box 61010, Houston, Texas 77208

IT IS FURTHER ORDERED that the defendant shall pay to this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address. United States Attorney's Office, Financial Litigation Unit, P. O. Box 61129, Houston, Texas 77208

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

☐ The Court orders commitment to the custody of the Attorney General and recommends:

April 23, 1991
Date of Imposition of Sentence

/s/ David Hittner
Signature of Judicial Officer
DAVID HITTNER

UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

Date 5/10/91

* * * * *

[RETURN OMITTED IN PRINTING.]

Supreme Court, U.S.
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No. 92-355

In the Supreme Court of the United States

OCTOBER TERM, 1992

MIDCO PIPE & TUBE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the participation of a pipe fabricator in a bid-rigging conspiracy among competing pipe distributors precludes application of the per se prohibition against price fixing among competitors under Section 1 of the Sherman Act, 15 U.S.C. 1.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 962 F.2d 465.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1992. The petition for a writ of certiorari was filed on August 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a distributor of specialty pipe. After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiring with a pipe fabricator and other pipe distributors to fix prices of specialty pipe, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. A2, A5. Petitioner was fined $250,000 and, as a condition of probation, was held jointly and severally liable with two other corporate defendants to pay restitution in the amount of $859,935 to the victims of the conspiracy. Pet. App. B2. The court of appeals affirmed. *Id.* at A1-A29.

Specialty pipe is employed in industrial applications to convey high-temperature, low-temperature, or corrosive fluids. The end users—typically oil refineries, power plants, and chemical companies—usually contract with a pipe fabricator to obtain, shape, and weld the pipe to fit the configurations of a particular project. The contracts normally direct the fabricator to purchase the pipe on a "cost-plus" basis, meaning that the fabricator buys the pipe from a specialty pipe distributor and charges the end user the distributor's invoice price plus a specified percentage of that price as the fabricator's markup. To ensure that they receive competitive prices, end users generally require a pipe fabricator to solicit competitive bids for the pipe from three or more distributors. The end user then directs the fabricator to purchase pipe from one or more of the bidders. Pet. App. A3 n.5.

In this case, the pipe fabricator, Texas Pipe Bending Company (TPB), participated in a conspiracy with various specialty pipe distributors, including petitioner and five of petitioner's competing distributors, to eliminate competition on bids for the purchase of specialty pipe. Pet. App. A2-A3 & n.1. When TPB was awarded a fabrication job that provided for pipe to be purchased on a

cost-plus basis, TPB's purchasing agent would call Ronald Palma, a pipe distributor, and arrange for him to "quarterback" the job. Palma would then call other selected distributors, tell them that they would be receiving requests for quotations from TPB on a cost-plus job, and designate either a five, ten, or 15 percent kickback from the distributors to TPB. The distributors would then pad their bids accordingly, including markups for themselves. *Id.* at A4, A5.

As the "quarterback," Palma would discuss with the various distributors what items of pipe they wished to supply, designate a particular distributor as the low bidder on particular items, and ascertain the price the designated distributor would submit for the relevant item. Pet. App. A5, A10-A12 n.12. The other bidders would then "protect" that price by submitting higher bids. *Ibid.* The distributors knew that their bids were being submitted pursuant to cost-plus arrangements and that their inflated bids would be passed through TPB to the end users who ultimately decided which distributor would supply what item. *Id.* at A10-A15. Indeed, the distributors "took pains to make these bids look legitimate to the end users." *Id.* at A14.

Petitioner participated in the conspiracy through its President, Robert Cohn, and a vice-president, Saverio Rossetti, and through Palma, whom it hired in 1983 as an independent sales agent in an effort to procure more business. Palma would inform Cohn or Rossetti that a job was to be a "10 or 15 per cent job[ ]." Rossetti would then add that amount to petitioner's bid price and add an extra amount for petitioner. Pet. App. A12-A13 n.12. Palma would also tell Rossetti or Cohn to "protect" certain prices bid by petitioner's competitors, and they would comply. *Id.* at A13-A14 n.12. Petitioner's bids thus reflected the conspiratorial agreement and were not competitive bids. *Id.* at A14 n.12. Petitioner continued

to use Palma's services and engage in the price protection scheme even after it learned that Palma was bidding as a competitor for his own company, All Star Industries, Inc., on some of the same jobs for which he was serving as petitioner's sales representative. *Ibid.*

TPB and two distributors pleaded guilty, while petitioner, two other distributors, and three individuals (including Palma) pleaded not guilty and were convicted. The court of appeals affirmed the convictions. It rejected the defendants' claims that the trial court erred in instructing the jury that the acts charged by the government fell within the per se prohibition against price fixing by competitors. Pet. App. A6-A17. The court concluded that the conspiracy charged—one "among distributors to fix the price of specialty steel and pass that non-competitive price onto end users" (*id.* at A8)—was not subject to a "rule of reason" analysis. *Id.* at A6-A8.[1]

ARGUMENT

Petitioner contends that its conduct was not per se illegal price fixing, but rather "acceptable conduct between contracting parties." Pet. 10. According to petitioner, the conspiracy should be viewed as a "vertical distribution arrangement" with the pipe fabricator, TPB, in which petitioner "increased its prices on bids merely to capitulate to the demands of its customer," TPB. *Id.* at i, 10. The court of appeals correctly rejected petitioner's theory as unsupported by the evidence, and petitioner's factbound contentions to the contrary do not warrant further review.

[1] The court of appeals also rejected petitioner's claim that the trial court erred in failing to charge the jury that "good faith" and the lack of "specific intent" were defenses to the crime charged (Pet. App. A17-A23), and Mannesmann International Alloy's challenge to provisions of the fine (*id.* at A24-A29). Petitioner does not challenge the court of appeals' rulings on those issues.

As the court explained, petitioner participated in a scheme in which "distributors who were normally horizontal competitors conspired to rig their bids with the *explicit intention* of inflating the cost aspect of cost-plus contracts and deceiving specialty steel end users." Pet. App. A10 (emphasis in original); see *id.* at A9-A17. "Rather than merely being these distributors' customer who then went on to cheat its own customers, TPB was the distributors' conduit for passing their inflated, noncompetitive specialty steel bids onto unsuspecting end users." *Id.* at A16.[2]

Petitioner mistakenly contends (Pet. 12-14) that the decision of the court of appeals conflicts with the Third Circuit's decision in *Sitkin Smelting & Refining Co.* v. *FMC Corp.*, 575 F.2d 440, cert. denied, 439 U.S. 866 (1978). As the court of appeals recognized, *Sitkin* is "easily distinguishable." Pet. App. A9 n.10. *Sitkin* involved a secret agreement between a seller and one of the potential buyer-bidders to allow that bidder an opportunity to match the highest bid and win the contract. 575 F.2d at 445. The Third Circuit rejected the contention that the agreement was a per se violation of the Sherman Act, stating that "[t]he price-fixing within the scope of the per se prohibition of § 1 * * * is an agreement to fix the price to be charged in transactions with third parties, not between the contracting parties themselves." *Id.* at 446.

Unlike *Sitkin*, the agreements here did not fix prices merely "between the contracting parties themselves." 575 F.2d at 446. Petitioner participated in a conspiracy among *competitors* to rig bids. Pet. App. A12-A14 n.12.

[2] Petitioner's claim that it was merely acceding to the demands of TPB rather than agreeing to fix prices (Pet. 13-14) not only is inaccurate, Pet. App. A8-A17, but also is beside the point. Petitioner is not excused from the antitrust laws simply because others encouraged petitioner to participate in the price-fixing scheme.

Petitioner and its competing distributors fixed prices on specialty pipe and used TPB to submit those prices as competitive bids to third-party end users.[3] The end users were led to believe that the distributors' bids were the product of competition rather than collusion and were thereby victimized by the price-fixing arrangement. Thus, this case bears no similarity to *Sitkin*.

Petitioner also contends (Pet. 15-17) that the decision of the court of appeals conflicts with the Ninth Circuit's decisions in *Newman* v. *Universal Pictures*, 813 F.2d 1519 (1987), cert. denied, 486 U.S. 1059 (1988), and *Orion Pictures Distribution Corp.* v. *Syufy Enterprises*, 829 F.2d 946 (1987). In *Newman*, the court dismissed a complaint on the ground that the parties to a contract could not have suffered antitrust injury from a subsequent price-fixing conspiracy, see 813 F.2d at 1522-1523, while in *Orion* the court similarly held that the contracting party did not suffer antitrust injury from allegedly anticompetitive actions taken at a time when "competition was no longer a factor" in determining the parties' obligations to one another, 829 F.2d at 949. Those cases are inapposite here.

Unlike *Newman* and *Orion*, this case is not a private action seeking damages for money due under the terms of a private contract. The United States instituted this suit to vindicate the national policy embodied in the Sherman Act of free and open competition. The government did not claim that end users were entitled to certain prices for specialty steel because those prices were guaranteed by contract. Rather, the government claimed that petitioner's actions violated a federal

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[3] Although TPB facilitated the price-fixing scheme primarily by submitting the distributors' rigged bids to end users, it also sold pipe out of its own inventory and pretended to compete with petitioner and the other conspirators. Pet. App. A16 & n.15.

statute prohibiting bid rigging, regardless of whether petitioner had an independent contractual obligation to end users to submit competitive rather than rigged bids.

Furthermore, the injury suffered here bears no similarity to the alleged injury in *Newman* and *Orion*. Petitioner argues that, because the end users had selected TPB to supply pipe on a cost-plus basis, "competition was no longer a factor" at the time the bid rigging occurred. See Pet. 16. That is not so. The cost-plus contracts did not set the prices for pipe. Rather, they specified that prices would be determined through submission of competitive bids from pipe distributors. It was in the very midst of this supposedly competitive bidding process that petitioner conspired with other distributors to fix prices through submission of rigged bids. Thus, this case is clearly distinguishable from *Newman* and *Orion*.

Finally, contrary to petitioner's assertions (Pet. 19-22), the decision in this case is not inconsistent with *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988), or any other decision of this Court. Petitioner contends that under *Sharp* the price-fixing agreement in this case is a "vertical" restraint that should have been judged under the "rule of reason" rather than the per se rule. Pet. 21. Petitioner mistakenly relies on a passage in *Sharp* stating:

> Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.

485 U.S. at 730. As that passage indicates, petitioner's price-fixing agreement with competing distributors was a "horizontal" restraint. The fact that the horizontal restraint was facilitated by a pipe fabricator did not convert it into a vertical restraint. Application of the per se

rule was therefore appropriate.[4] Petitioner and the other distributors cannot avoid the per se prohibition on price fixing among competitors "simply because their conspiracy depended upon the participation of a 'middleman', even if that middleman conceptualized the conspiracy, orchestrated it by bringing the distributors together around contracts it held with its buyers, and collected most of the booty." Pet. App. A16.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1992

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[4] *Sharp* held that an agreement between a manufacturer and a distributor that affected price, but did not fix prices, was not per se illegal. It did not alter the application of the per se rule against price fixing by competitors. Indeed, *Sharp* cited with approval earlier holdings in which the presence of a horizontal agreement as part of a vertical agreement justified application of the per se rule. 485 U.S. at 734-735 (citing *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)).

[5] Although petitioner suggests that "the *per se* rule should not be applied to restraints which have the potential to create efficiency" (Pet. 17-18), petitioner has failed to offer any credible procompetitive justification for the collusive bidding that took place in this case.